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# NOTES ON SUITS BETWEEN STATES: KANSAS *v.* COLORADO.

1. The suit of the State of Kansas against the State of Colorado, lately considered in the Supreme Court of the United States, ranks by mere title among unusual and important cases; and it is especially noteworthy because, for the first time, the court has been requested to adjudicate the claims of rival States in respect of the use of interstate waters.

The purpose of this study is the consideration of some of the larger questions suggested by the suit. I shall first consider interstate controversies generally. Then I shall discuss the case of Kansas *v.* Colorado, and consider its relation to the subject of interstate waters, particularly in the matter of irrigation directly involved in the suit.

## I.

### INTERSTATE CONTROVERSIES.

*Federal Jurisdiction.*

2. Controversies between States of the Union are on a different footing from disputes between independent nations. None are determinable by war, nor even by diplomatic intercourse in the ordinary sense, though, with the assent of Congress, some of them are susceptible of settlement by interstate compact. All that are of a justiciable nature may be determined by the Supreme Court of the United States at the suit of one of the parties, for the Constitution vests in this court "original jurisdiction" of "controversies between two or more States."[1]

[1] Note as a matter of antiquarian interest that the Articles of Confederation, which loosely bound the States prior to the adoption of the Constitution, provided for the creation of special commissions to determine interstate controversies upon the presentation of a petition to Congress by one of the parties. Eight petitions were presented, each involving claims to territory. Commissions were actually appointed in but two cases, and only one of these was adjudicated—the dispute between Pennsylvania and Connecticut over the Wyoming lands, where judgment was given for Pennsylvania. See Mr. J. C. Bancroft Davis's Appendix to 131 U. S. pp. 1–61.

3. The Constitution also conferred upon the Supreme Court jurisdiction over controversies "between a State and citizens of another State," and between "a State * * * and foreign states, citizens or subjects."

In the discussion preceding the adoption of the Constitution by the States, Hamilton argued that these clauses did not permit individuals to sue a State without its consent.[1] The same opinion was expressed by Madison, and also by Marshall who said "I see a difficulty in making a "State a defendant which does not prevent its being plaintiff."[2] But soon after the adoption of the Constitution the Supreme Court gave judgment against Georgia in a private suit, despite its protest, holding that the States had surrendered their sovereign immunity from suit by accepting the clauses in question. Thereupon private suits were expressly barred by the adoption of the Eleventh Amendment of the Constitution: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

Note here that if a private suitor, while not impleading a State by name, craves a judgment plainly involving a State's dignity, the court will dismiss the complaint in obedience to the Eleventh Amendment.[3]

A strict construction of the Eleventh Amendment might forbid the Federal courts to entertain any cause wherein a judgment would affect adversely the interests of a State, but a more liberal construction is approved. "The immunity from suit belonging to a State," says the Supreme Court, "which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction."[4]

[1] Federalist, No. 81. [2] II Elliot's Debates, 391, 406, ed. 1831.

[3] Cunningham *v.* Macon & Brunswick R., 109 U. S. 446.

[4] Clark *v.* Barnard, 108 U. S. 447.

4. A few years ago the decision in Chisholm *v.* Georgia was severely criticised in Hans *v.* Louisiana.[1] The court, commending the dissenting opinion of Justice Iredell, said:

"The other justices were more swayed by a close observance of the letter of the Constitution without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies between a State and citizens of another State; and between a State and foreign States, citizens or subjects; they felt constrained to see in this language a power to enable the individual citizens of one State or of a foreign state, to sue another State of the Union in the Federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard-of remedies by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the Federal courts with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts."

While the criticism in the Hans case is of historical interest only in regard to the particular subject of suits by individuals against States we must consider its bearing on other suits against States. In the Hans case Justice Bradley said: "The suability of a State without its consent was a thing unknown to the law"; and upon this proposition the criticism of Chisholm *v.* Georgia was founded. The question then is by whom has a State of the Union consented, once for all, to be sued in the Supreme Court by accepting the obligations of the Constitution?

Has a State consented to be sued in a proper case by another State? Yes. This is well settled, as we shall see.

5. Has a State consented to be sued in a proper case by the United States?

The Constitution declares that the "judicial power of the United States shall extend to * * * controversies to which the United States shall be a party," and that the Supreme Court shall have original jurisdiction in cases "in which a State shall be a party," but its enumeration of causes does not expressly include controversies between the United States and a State. Hence, in Florida *v.* Georgia, Justices Curtis and Campbell came to the conclusion that the United States cannot be a party to a ju-

[1] 134 U. S. 11–14.

dicial controversy with a State in any court, [1] but the majority of the court did not consider this subject involved in the case.

The United States *v.* North Carolina [2] was an action of debt for the recovery of interest on State bonds held by the United States, and was decided in favor of the State. The question of jurisdiction does not appear to have been discussed, but Justice Harlan said afterwards: "it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State." [3]

In United States *v.* Texas,[4] the question of jurisdiction was argued in an original suit brought to determine the boundary between Texas and the Territory of Oklahoma. Texas insisted that the controversy could only be settled by agreement. The court supposed an agreement to be impossible. It found that the circuit courts have no jurisdiction of a suit by the United States against a State. It declared that even if Texas should consent to be sued in her own courts by the United States an action of this sort would be "unwarranted both by the letter and spirit of the Constitution." It refused, of course, to contemplate a settlement by force. It decided that the case was within its original jurisdiction, and subsequently[5] rendered a final judgment.

"We cannot assume," said the court, "that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between States of the Union and foreign states, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. * * * It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State." [6]

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[1] 17 Howard, 506, 521. [2] 136 U.S. 211. [3] U. S. *v.* Texas, 143 U. S. 642.
[4] 143 U. S. 621. [5] 162 U. S. 1. [6] 143 U. S. 644.

6. May a State sue the United States without their consent? This question has never been presented. Chief Justice Jay said, in Chisholm *v.* Georgia:[1]

"The same section of the Constitution which extends the judicial power to controversies 'between a State and the citizens of another State,' does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning, but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against States or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments by the aid of the executive power of the United States; but in cases of actions against the United States there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view."

These observations seem broad enough to cover actions by States as well as by private persons. But in Mississippi *v.* Johnson[2] the court, while refusing leave to file the bill in question, said: "It is true that a State may file an original bill in this court. And it may be true in some cases that such a bill may be filed against the United States."

7. Whether the United States may participate in a suit between States was discussed in the boundary controversy between Florida and Georgia.[3] The Attorney General filed an information and asked leave to intervene, for the reason that a large part of the disputed territory was claimed by the United States as public land which had come into their possession by the treaty of 1819 with Spain. Four judges would have denied the motion. Three of these expressed the opinion that by granting it the United States would become party to a controversy between States, and this, they thought, was not permitted by the Constitution.

The court, however, granted the motion, holding that the United States did not thereby become a party to the suit in a technical sense, because judgment would not be rendered for or against them; they were simply allowed to be heard before judgment was given in a case affecting their interests.

[1] 2 Dallas, 478. [2] See *infra*, Sec. 23. [3] 17 Howard, 478.

Reading this decision in connection with the decision in United States *v.* Texas, affirming the right of the United States to sue a State, and with the *dictum* in Mississippi *v.* Johnson in respect of suits against the United States, we may contemplate the possibility of the United States intervening in an interstate suit as a party.

8. Has a State consented to be sued in a proper case (assuming there may be such) by a foreign state?

Madison was of opinion that a State could not be impleaded by a foreign state: "I do not conceive," said he, "that any controversy can ever be decided in these courts between an American State and a foreign state without the consent of the parties. If they consent, provision is here made."[1] This question has never been presented to the Supreme Court, which has held, however, that an Indian tribe is not a "foreign state" within the meaning of this clause.[2]

Judge Story says:

> "In regard to controversies between an American and a foreign state it is obvious that the suit must, on one side at least, be wholly voluntary. No foreign state can be compelled to become a party, plaintiff or defendant, in any of our tribunals, if, therefore, it chooses to consent to the institution of any suit, it is its consent alone which can give effect to the jurisdiction of the court. It is certainly desirable to furnish some peaceable mode of appeal in cases where any controversy may exist between an American, and a foreign state, sufficiently important to require the grievance to be redressed by any other mode than through the instrumentality of negotiations.[3]

Judge Curtis, after his retirement from the Supreme Court, gave an opinion to the Governor General of Canada that a branch of the Cayuga tribe of Indians which had migrated from New York to Canada might, by petitioning the British Government, place it in a position to sue New York in the Supreme Court on account of certain claims.[4]

Opposed to the views of Story and Curtis is the *dictum* in Hans *v.* Louisiana[5] which would bar foreign states as suitors as well as individuals. If this *dictum*, that the States have not consented to be sued by foreign states, be cor-

[1] II Elliot's Debates, 391. [2] Cherokee Nation *v.* Georgia, 5 Peters, 1. [3] Commentaries, sec. 1699. [4] Memoir of B. R. Curtis, I, 283. [5] *Supra*, Sec. 4.

rect the constitutional provision regarding "controversies between States and foreign states" imports no obligation whatever, for certainly no foreign state has consented to be sued by a State. Perhaps the Constitution should not contain a provision enabling a foreign government to sue a State, especially as the State has not a reciprocal right to sue that government; yet if we accept Madison's opinion that the court is only opened to such a suit on consent of the State, why should we not apply this to interstate controversies, and by so doing assimilate all suits against States to arbitrations, where consent is the foundation of jurisdiction? But since a State is presumed to have consented to be sued in our Supreme Court by a sister State, and by the United States, on what theory of constitutional interpretation is it presumed to object to being sued in this court by a foreign state? Unless, indeed, it shall be adjudged that where a State has no reciprocal right to sue, it will not be presumed to place itself at a disadvantage.

9. Until the Supreme Court shall have denied the right of a foreign government to sue a State more definitely than in the observation in Hans *v.* Louisiana it is permitted to doubt the impossibility of such a suit, though its possibility must be so remote as to make the whole question almost academic. For any justiciable "controversy" between a State and a foreign government must be one clearly excepted from the fundamental rule which constitutes the Federal government the sole representative of the nation before a foreign government, and which makes negotiation the regular method for the redress of international grievances. Should Texas aggrieve Mexico by illtreating her citizens, by holding disputed territory, or by diverting international streams Mexico must look to the United States, not to Texas, and to the Department of State, not to the Supreme Court. But suppose Texas, with the consent of the United States, should make with Mexico one of those compacts suggested in the Constitution, or should become indebted to Mexico in some lawful and regular way, why should not Mexico sue for breach of contract as well as a State in like case?

10. There is a difference in the service performed by the Supreme Court according as it adjudicates a suit by a State against a citizen of another State, or a suit between States. Justice Gray explains that suits by one State against citizens of another were placed by the Constitution within Federal jurisdiction in order to secure an impartial consideration not so surely obtainable in the courts of the defendant's State.[1]

"The grant is of judicial power," he continues, "and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not on settled principles of public and international law be entertained by the judiciary of the other State at all."

A luminous comment! Unquestionably the Constitution does not enlarge the list of causes maintainable by one State against the citizens of another. It simply opens a new forum wherein normal causes may be impartially adjudicated. In the same opinion Justice Gray says:[2]

"This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments."

But this statement merely refers to the practice in cases of a particular class—notably in Kentucky *v.* Dennison.[3] It is not to be understood as likening all interstate, to international controversies, otherwise none would be justiciable in the Supreme Court, for the latter are political, and not legal in their nature, and are only made justiciable on occasion by the special consent of the political departments of the disputing governments to submit their differences to arbitration. A nation can neither drag another, or be dragged by another before its own courts, and an arbitral tribunal owes its existence to the political action of the governments concerned.

In short, Federal jurisdiction of suits brought by a State against citizens of another State is thus distinguished from the jurisdiction of interstate suits: In one case the Constitution opens a better court for the determination of causes already justiciable; in the other it opens a court for the determination of causes not otherwise regularly justiciable at all.

[1] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 289. [2] p. 288. [3] *Infra*, Sec. 28.

11. To bring an interstate case within the competency of the court the pleadings must disclose a real collision between States—as Chief Justice Fuller says:

"It must appear that the States are in direct antagonism as States;"[1]

and of this jurisdictional fact the court must be the judge.

The court may discover that the complaining State has no proper interest in the alleged cause of action. In New York *v.* Louisiana, and New Hampshire *v.* Louisiana, bills were filed to compel payment of state bonds, but it appeared that the complainants held the bonds in suit as trustees for some of their citizens, who were themselves forbidden to sue by the Eleventh Amendment of the Constitution. The suits were dismissed because the complaining States were merely collecting agents for private bondholders, to whom they lent their names for the purpose of circumventing the Amendment.

It seems also that a State cannot maintain suit on account of an alleged special interest in a matter which, according to the Constitution, is of Federal concern.[3] At all events this is so in the case of navigable waters after Congress has actually exerted its superior powers. In 1876 South Carolina sought to enjoin both the State of Georgia and the United States authorities from obstructing the navigation of the Savannah River, contrary to the terms of a compact made between the States prior to their acceptance of the Federal Constitution. The complaint was dismissed upon the ground that the engineering works alleged to cause the obstruction were undertaken by the United States in virtue of their power to regulate commerce conferred upon them by the Constitution, by adopting which the States had surrendered their particular rights under the prior compact.[4]

The court may discover that the defendant State is wrongfully impleaded. In Louisiana *v.* Texas[5] the court refused to hold Texas responsible for the harsh and invidi-

[1] Missouri *v.* Illinois, 180 U. S. 249. [2] 108 U. S. 76.

[3] See Louisiana *v.* Texas, 176 U. S. 19.

[4] South Carolina *v.* Georgia, 93 U. S., 4. See also Wisconsin *v.* Duluth, 96 U. S., 379. [5] 176 U. S. 1.

ous manner in which its health officer enforced a quarantine statute against citizens of Louisiana, the statute itself disclosing no animus against the latter State: "The acts of State officers in abuse or excess of their powers," said the court, "cannot be laid hold of as in themselves committing one State to a distinct collision with another State."

*What Controversies are Justiciable?*

12. Assuming that a suit presents a real controversy between States, the next question is whether this is of a justiciable nature, and of this question also the court is the judge, since the Constitution prescribes no definition.

"Though the Constitution does not extend the judicial power to *all* controversies between two or more States," says the Supreme Court, "yet it, in terms, excludes none, whatever may be their nature or subject."[1]

A State possesses land, buildings, public works and other valuable property. Like a private owner it may sue private persons on this account.[2]

While as yet no decision in an interstate suit has involved merely proprietary rights, presumably these may be asserted as freely against another State as against individuals. I say "presumably" because a suit now pending between South Dakota and North Carolina raises the question whether the complainant is really entitled to an action on account of the particular property which is the subject of the suit.

13. South Dakota has filed a bill against North Carolina as "owner and holder in its own right" of ten mortgage bonds, issued by North Carolina on account of a railroad, which the defendant refuses to honor. The complainant alleges that the defendant holds a large block of valuable stock in the railroad, and prays that this may be equitably applied to its relief. North Carolina does not demur to the bill, but, in an answer, protests that the court is without jurisdiction, because the suit is brought in the interest of pri-

[1]Rhode Island *v.* Massachusetts, 12 Peters, 721.

[2]Pennsylvania *v.* Wheeling Bridge Co., 13 Howard, 518; Texas *v.* White, 7 Wallace, 700; Florida *v.* Anderson, 91 U. S. 667; See Pennsylvania *v.* Quicksilver Co., 10 Wallace, 533; Alabama *v.* Burr, 115 U. S. 413.

vate bondholders, contrary to the Eleventh Amendment. It then proceeds to defend on the merits, alleging, among other things, that the bonds are not valid obligations, having been issued and sold contrary to the provisions of the authorizing statute. But I shall not go into the merits of the case. It is sufficient for our purpose to know that a State has come into possession of bonds repudiated or disavowed by another State, and seeks a judgment on their account.

This case differs from the Louisiana cases[1] in this respect, that the complaining State appears to be the real owner of the bonds in suit, and not, as in the earlier cases, an avowed agent for private bondholders. If the Supreme Court shall look no further than this fact of ownership it will give judgment for South Dakota, if the bonds are found to be valid obligations, for if one State engages to pay money to another—and a State's bonds are, *prima facie*, engagements with whomsoever happens to own them—the latter would seem to have a right of action.[2] But the court, being impressed by the unusual circumstance of a State's acquiring repudiated bonds of a neighbor State and bringing suit upon them, should inquire how and why they found their way into the treasury of South Dakota, who would profit ultimately by a judgment for their payment, and what precedent the judgment would establish.

The bonds in suit are but a fraction of the outstanding bonds of a particular issue, which itself is but a fraction of an enormous number of bonds issued by various States, and long since repudiated. The court might fairly anticipate that a judgment for the complainant in this suit would attract all these bonds in existence into public treasuries, there to be metamorphosed into causes of action.

Furthermore, whilst judgments for this particular issue of bonds might be satisfied by a forced sale of railroad stock held by North Carolina as in private ownership,[3] a large part of the repudiated bonds were issued on the sovereign credit of the States, and the court might anticipate bitter opposition from these States, and a serious difficulty in enforcing judgments against them for sums probably far

[1] *Supra*, Sec. 11. [2] See U. S. *v.* North Carolina, *supra*, Sec. 5.
[3] See *infra*, Sec. 29.

in excess of the value of public property not actually impressed with a governmental use. Although such apprehensions will not excuse a denial of justice to South Dakota, they advise the court to determine with peculiar accuracy its real position, and the true meaning of a judgment in its favor.

14. Where the relation of borrower and lender exists between independent sovereigns it is usually induced by political motives, such as strengthening an ally or fastening a mortgage upon coveted territory; rarely does a government deal in the obligations of another merely for investment or speculation. Now for such a relation between States of the Union political motives are out of the question, and, usually, financial motives would seem to be quite as questionable as in the case of independent sovereigns. Yet a State is not forbidden to acquire another's bonds, and if it acquires them in due course the right to sue upon them may be conceded. But the speculative acquisition of obligations not enforceable by the persons who transfer them is not, in my opinion "due course": it is not a transaction entitled to consideration at the hands of the Supreme Court.

Thus far I have spoken only of the bonds of a State, but a rule that would permit suit upon these would permit it upon all pecuniary claims. Any person having a repudiated, or even a disputed claim against a State could give it a standing in court by assigning it to another State. How far this practice would obtain it is impossible to say, but the willingness of States to speculate in the repudiated bonds of their neighbors is evidence of a disposition to bring any suit that promises profit.

15. A judgment for South Dakota might open a new way of collecting old debts, or, at least, of harrying delinquent debtors of far-reaching consequence abroad as well as at home. Intervention by a sovereign to enforce contractual obligations made with its citizens by another sovereign is not unknown. Some writers affirm the propriety of this course in rather broad terms.[1]

[1] See Vattel, II, sec. 81; Phillimore, II, p. 26.

The United States have commonly refused to press private contractual claims against another government;[1] and the views of statesmen generally are probably expressed in Lord Palmerston's circular addressed to British representatives abroad, the gist of which is that a government will not play the collecting agent for domestic creditors of a foreign state except under peculiar circumstances.[2] In fact, a government intervening on behalf of private contracts usually masquerades as a collection agent to promote ulterior political purposes. But if our Supreme Court shall encourage the acquisition by a State of claims against another, the example may not be without influence in international affairs. If it be permissible for a State of the Union to buy up claims against a sister State, how commendable for a nation to profit by the delinquencies of a stranger.

In 1844 Mr. Benjamin R. Curtis asserted that a foreign government might sue a State in the Supreme Court as assignee of debts due its citizens, and that the rank of the suitor would preclude the court from inquiring into the causes and motives of the suit.[3] Such a suit has never been brought, but, should the Supreme Court give judgment for South Dakota, against North Carolina's protest, holding that ownership of bonds gives unquestionable right to sue, would it be altogether fanciful to anticipate a foreign sovereign's taking advantage of the new rule to file a bill against a State for the satisfaction of national claims, whose existence must be conceded and whose origin cannot be questioned? And might not foreign states be encouraged by our attitude to take assignments of claims against Spanish-American republics, and press them with new vigor and better assurance?

16. The bonds actually in suit appear to be a gift to South Dakota with a request that any proceeds shall be applied to educational purposes; and the State would thus reap the whole benefit of a favorable judgment. But even

[1] Wharton's Digest, sec. 231.

[2] See also Hall, 4th ed. 294; Despagnet, *Droit International Public*, 2nd ed. 198.

[3] State Debts, North American Review, Jan. 1844; Memoir of B. R. Curtis, II, 146.

if the court could at once render such a judgment with outward respect for the Eleventh Amendment by limiting a State's right of recovery to claims acquired without consideration, and whose proceeds shall remain in the State's hands, the decision would still be ill advised. For the relation between the States is such that none should profit by gifts of bonds of no value to the giver, and which can be realized only at the expense of another State. Why should North Carolina be forced to build a college for South Dakota?

Suppose, to take an extreme case, every collectible dollar of repudiated State indebtedness should be transferred by due process of law into the treasuries of sister States. States would have acquitted their debts: True, but they would not have paid their creditors. As a punishment for not having paid money to whom it was justly due they would be mulcted for the benefit of a party who had done, nothing to deserve it.

I can perceive no equity in a transfer of money from one State to another without real consideration, and, were this a possible transaction, private bondholders would exact substantial percentages of their bonds by threatening to throw them to States who would collect the full amount. Thus States would be coerced, contrary to the spirit of the Eleventh Amendment.

While I am of opinion that North Carolina cannot be forced to pay the bonds against a protest, it is not impossible that the suit of South Dakota may lead to beneficial results. Without discussing the question whether the defence made by North Carolina on the merits may be seized upon by the court as rendering the plea of the Eleventh Amendment a formality, and as proof of the State's willingness to submit its cause to adjudication, it is evident that this defence places the subject of repudiation upon a new, and better footing. Heretofore repudiating States have excused their acts to themselves by asserting that the bonds were not a proper charge. Now a State attempts to justify before an impartial tribunal. In these circumstances, the Supreme Court, whatever judgment it may render, may be expected to give its opinion as to the validity of the bonds.

If it shall find them valid, North Carolina will be formally declared a debtor. May we not read between the lines of the State's defence a desire to improve the State's credit? May we not anticipate a proper settlement if the bonds shall be pronounced valid?

If a State of the Union becomes indebted in due course to the United States, or to another State (perhaps to a foreign state), it is liable to suit. And this is so if evidences of debt, originally in private hands, come into public treasuries in due course. But when a claim is acquired by a government only because a private claimant cannot secure its payment, a suit for its recovery should be dismissed as an attempt to evade the Eleventh Amendment.

I have discussed this bond controversy at some length partly because of its own importance, and partly to give point to the suggestion that proof of a proprietary interest may not be invariably a sound foundation for a suit by one State against another.

17. Passing from actions brought by a State as a property owner, we come to actions where it sues to maintain the dignity and interests of a political corporation.

The right of a State to sue at all in its distinctively political capacity has been contested.

"It is argued," says Justice Miller, "that this court can take cognizance of no question which concerns alone the rights of a State in her political or sovereign character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before us."[1]

Apprised by this statement of the delicacy of the jurisdictional question we will first observe its treatment in adjudged cases.

18. Interstate boundary controversies are essentially of a political nature; any public proprietary rights that may

[1] Wisconsin *v.* Duluth 96 U. S. 379, 382.

happen to be involved in their adjustment are ancillary to the conspicuous matter of sovereign territorial jurisdiction. Because of their political nature Chief Justice Taney once deemed them beyond the competency of the Supreme Court.[1] Fortunately he was overruled by his associates, and the jurisdiction of the court in these cases is settled.

"We consider, therefore," says the Supreme Court, "the established doctrine of this court to be that it has jurisdiction of questions of boundary between the States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts and agreements between those States, or because the decree which the court may render affects the territorial limits and sovereignty of the States which are parties to the proceeding."[2]

In Missouri *v.* Illinois[3] the court said, "But such [proprietary and boundary] cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy," and it affirmed for the first time the right of a State to enjoin another on account of threatened physical injury to a substantial section of its community. The alleged cause of injury was the Chicago Drainage Canal, authorized by the Illinois legislature, and intended to carry the sewage of Chicago across country to a point of discharge in the Mississippi River above the City of St. Louis. The Supreme Court affirmed the right to maintain the action, leaving the question of actual damage to be determined later. In this case the court took a step in advance of all previous decisions in holding substantially that a State, as the representative of a community, may sue another State on account of threatened injury to its health and property.

19. The exercise of jurisdiction in the boundary cases, and in Missouri *v.* Illinois, silences the contention that a State cannot sue another except on account of some proprietary interest, but does not indicate, of course, how far the court

[1] Rhode Island *v.* Massachusetts, 12 Peters, 752; 4 Howard, 639.

[2] Alabama *v.* Georgia, 23 Howard. See also New Jersey *v.* New York, 5 Peters, 284, 290; Rhode Island *v.* Massachusetts, 12 Peters, 657; Missouri *v.* Iowa, 7 Howard, 660; Florida *v.* Georgia, 17 Howard, 478; Virginia *v.* West Virginia, 11 Wallace, 11, 35; Missouri *v.* Kentucky, 11 Wallace, 395; Indiana *v.* Kentucky, 136 U. S. 479; Nebraska *v.* Iowa, 143 U. S. 359. [3] 180 U. S. 241.

will go in sustaining suits brought by States in their purely political capacity.

Alexander Hamilton said:

"But there are other sources besides interfering claims of boundary from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances, which had heretofore made their appearance, yet it is warrantable to apprehend, that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against. *Whatever practices may have a tendency to disturb the harmony of the States, are proper objects of Federal superintendence and control.*"[1]

Whatever interstate disputes Hamilton may have apprehended from a recrudescence of the spirit that prompted the "fraudulent laws," the sentence I have italicized suggests too broad a range of justiciable controversies. Hamilton was perturbed by the jealousies rife among the States; he was anxious to create a tribunal competent to settle all interstate differences. But the judicial department of the government Hamilton aided so mightily in founding has not accepted the broad political jurisdiction he seems to commend. According to Hamilton's anticipation, if I rightly understand it, the States, relinquishing independent sovereignty, would still be able to carry to the Supreme Court any controversy which, as independent sovereigns, they could have dealt with by diplomacy or war. But in fact, there are controversies which the States have surrendered the power to press by sovereign methods, without acquiring the compensatory right to obtain a judgment at law. There are vexations which, in the long run, the republic can better afford to leave a State to suffer at the hands of another than to turn the Supreme Court into a cockpit where States may wrangle over conflicting policies.

It was to be expected that a State, administering its affairs with prime regard to its own interests, should sometimes displease, and even damage a neighbor. This expectation has often been realized. It is realized to-day to a

[1] Federalist, No. 80.

certain degree. Inevitably the policies of our several commonwealths will rarely be altogether mutually agreeable. Yet had all differences been matters of judicial cognizance the spirit of litigation, inflamed by opportunity, would have multiplied and embittered disputes to the prejudice of the republic, perhaps to its destruction.

20. A particular limitation upon justiciable interstate controversies is affirmed in the following opinion:

"The position that the jurisdiction conferred by the Constitution upon this court, in cases to which a State is a party," says the Supreme Court, "is limited to controversies of a 'civil nature,' does not depend upon mere inference from the want of any precedent to the contrary, but has express legislative and judicial sanction."[1]

It is clear that the limitation of jurisdiction to controversies of a "civil nature" forbids one State to prosecute another, or any persons in another, in the Supreme Court for alleged transgression of its penal laws. This means, first, that a State is not liable to criminal prosecution; and, in respect of persons, it simply exemplifies the well known rule that one sovereign cannot require another to punish offenders against the former's laws. "The courts of no country execute the penal laws of another" said Marshall.[2] Yet when a State complains that acts done beyond its jurisdiction are contrary to its laws, it does not seem necessary to demonstrate that these laws are of a penal nature in order to exclude the case from the jurisdiction of the Supreme Court, because the above rule is really a part of the broader rule which makes all laws ineffective beyond the jurisdiction of the state which enacts them. "The laws of no nation can justly extend beyond its own territories," said Story, "except so far as regards its own citizens;"[3] and the state itself must deal, as best it can, with its citizens who break its laws in foreign territory.

21. I am not inclined to attach vital importance to the suggestion that a State cannot maintain an action against another except for a cause that would warrant a private suit,[4] for the broad reason that the community and the indi-

[1] Wisconsin *v.* Pelican Insurance Co., 127 U. S. 297.

[2] The Antelope, 10 Wheaton, 123. [3] The Apollon, 9 Wheaton, 370.

[4] See South Carolina *v.* Georgia, 93 U. S. 14.

vidual are too dissimilar to justify the drawing of complete analogies between their respective rights and duties. Yet the propriety of an interstate suit is undoubtedly strengthened where the alleged cause would sustain a private action; indeed, the only suits where the complaining State has prevailed have involved causes for which, all things being equal, a private person might have sued.

Furthermore, when a State comes into court it will be obliged, as strictly as a private suitor, to show substantial injury. The immensity of its interests, as contrasted with the narrow interests of the citizen, will not justify allegations of vague and remote damage.

22. It is unlikely that the last novel suit has been brought by one State against another, but, to quote the Supreme Court,

"it would be objectionable, and indeed impossible * * * to anticipate by definition what controversies can, and what cannot be brought within the original jurisdiction of the court."[1]

Yet, looking beyond the adjudged cases and their plain inferences, we are not without a general test for distinguishing justiciable, from non-justiciable controversies. The traditional opinion of the Supreme Court in this regard is well expressed by Justice Bradley:

"The cognizance of suits and actions unknown to the law, and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. * * * Of other controversies between a State and another State, or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take notice."[2]

22a. Professor Harrison Moore of Melbourne makes an interesting contribution to the subject of justiciable controversies in his commentary on the Constitution of Australia. After commenting on Chisholm *v.* Georgia and the Eleventh Amendment of our Constitution, he says:

"But unlike the Constitution of the United States, the Commonwealth Constitution confers an important power on the Legislature in respect to proceedings against State or Commonwealth. By section 78, 'The Parlia-

[1] Missouri *v.* Illinois, 180 U. S. 241. [2] Hans *v.* Louisiana, 134 U. S. 15.

ment may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the judicial power.'

"This section was the subject of a keen debate in the Convention at Melbourne; and there was great difference of opinion as to the meaning of a 'right to proceed.' It is obvious that the section goes far beyond the regulation of procedure; that it implies the giving of a remedy against the State in certain cases where the State law has provided none. It may be conceded that it enables the Commonwealth Parliament to make laws giving rights against the States under matters within the Legislative power. But, as has been seen, the judicial power is not merely commensurate with the legislative power; it extends to causes by reason of the parties concerned. 'Within the judicial power' are 'all matters' in which the Commonwealth is a party, 'between States,' and 'between a State and a resident in another State'; and in respect of such matters the Parliament may confer 'a right to proceed.' The governing word 'matters' must receive here the same interpretation as was given to it above; and accordingly it would seem that the Parliament cannot give a right to proceed against a State save in respect of controversies 'which on the settled principles of public law are subjects of judicial cognizance.' It may in the cases prescribed deprive a State of the benefit of the doctrine that 'the King can do no wrong'; deprive it of its immunity from suit and make it liable for the acts of its servants and agents wherever an individual would be liable, e. g. for tort. But the Parliament could hardly create entirely new causes of liability; the words 'right to proceed' are not apt to describe substantive rights unconnected with any subsisting liability. Thus, it is conceived that the Parliament could not, under this section, provide that the State of New South Wales should be answerable in damages to a riparian owner on the Murray or the Darling in South Australia for waters abstracted to his hurt by the Government of New South Wales as a riparian owner on the upper river, and that even though under the law of New South Wales, a riparian owner in New South Wales might have an enforceable claim against the Government for infringing his riparian rights. Still less, it would seem, could the Parliament give a right to proceed for breach of political duties by the State, as for failure by an efficient police to protect non-residents against mob violence.

"The same principles will in general govern the right to proceed in matters between State and State. The Parliament may get rid of the obstacles, which arises from the fact that the Crown personifies each; but it could not create new rights of a substantive kind. The courts may be called on some day to determine whether the powers of the riparian States over the rivers are similar to the rights of individual riparian owners; and it is possible that under section 78 the Parliament might make a law that this question—which obviously might arise in litigation between private persons resident in New South Wales and South Australia—might be directly raised in proceedings between the States. But the Parliament could not, under section 78, declare what are the respective rights of the States in the rivers, whatever may be its power under other parts of the Constitution.

" 'Matters in which the Commonwealth is a party' would include proceedings in which the Commonwealth and a State are disputants. The controversies which have arisen in Canada between the Dominion and the Provinces as to proprietary rights in territory are typical of matters between the Governments which are fit for judicial determination, and it is clear that the Parliament may provide that they may be raised directly in a suit between Commonwealth and State, and not merely in actions between their respective grantees, or between one Government and the grantee of the other. Again, the financial relations between Commonwealth and States established by the Constitution are akin to proprietary rights and contractual obligations, and they, too, might be made the subject of judicial determination under a 'right to proceed.' It may be that section 78 goes further; and that under it the Parliament may provide for direct litigation between Commonwealth and State of questions as to their respective powers which are in any way capable of judicial determination. It is true that in the United States it is held, as already observed, that the judicial power does not extend to the consideration of such questions, except as incidental to matters of right. But the question of the validity of an act of Parliament, which may arise any day in the course of litigation, though it may be an abstract question, is, from its nature, not purely a question for the cognizance of the political departments."[1]

## II.

### PROCEDURE.

### *Institution of Suit.*

23. In Chisholm *v.* Georgia[2] the Supreme Court entertained an action in *assumpsit* against a State, and in United States *v.* North Carolina[3] an action of debt. There is nothing to prevent the court from entertaining common law actions by one State against another,[4] but, in fact, all interstate suits have been commenced by bill in equity.

It is the rule to apply to the court for permission to file the bill.[5] Permission has never been refused in an interstate suit. But when Mississippi prayed leave to file a bill to enjoin the President from executing the Reconstruction Acts on the ground of their unconstitutionality the court,

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[1] The Commonwealth of Australia, 267–269. [2] 2 Dallas, 419.
[3] 136 U. S. 211. [4] See U. S. *v.* Texas, 143 U. S. 627.
[5] See Georgia *v.* Grant, 6 Wallace, 241.

after hearing arguments, refused to receive it.[1] Permission was lately refused in Minnesota *v.* The Northern Securities Company. Minnesota alleged that the company, a New Jersey corporation, had acquired a majority of the stock of the Great Northern and the Northern Pacific Railroads, the former a Minnesota corporation, for the purpose of consolidating them effectively, contrary to the laws of Minnesota, and the State prayed leave to file a bill enjoining the company from holding or controlling the stocks in question. The court found that the Securities Company did not fully represent the railroad companies, as it held only a majority, and not all of their respective stocks; consequently all the parties in interest were not before the court. It found this defect irremediable because it would not have jurisdiction of a suit of the State of Minnesota against its own corporation.

"As then," said the court in conclusion, "the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is denied."

But an application by the State of Washington for leave to file a bill against the Securities Co. has just been granted, the court saying (according to newspaper report):

"In Minnesota *v.* Northern Securities Company application to file a bill similar to that before us and seeking similar relief was made, and after examining the bill we directed notice to be given and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties who could not be brought in without defeating our constitutional jurisdiction. That insuperable difficulty does not meet us on the threshold here, but among other objections to granting leave it is urged that the court has no jurisdiction on the subject matter because the bill does not present the case of a controversy of a civil nature, which is justiciable under the Constitution and laws of the United States, in that the suit does not involve rights of a proprietary or contractual nature, but is purely a suit for the enforcement of the local law and policy of a sovereign and independent State, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory. In the exercise of original jurisdiction the court

[1] Mississippi *v.* Johnson, 4 Wallace, 475.

has always necessarily proceeded with the utmost care and deliberation, and in respect of all contested questions, on the fullest argument. And in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case and those which may succeed it. It seems to us wisest, therefore, to take the same action on the pending application as was pursued in Louisiana *v.* Texas, that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the general rule."

Applying these precedents to interstate cases we find that leave to bring action will be granted unless the court, after hearing arguments on the motion, is satisfied that the matter is plainly beyond its jurisdiction.

24. When a bill has been filed the defendant State will be served with process, but no coercive measures will be employed to compel appearance. In default of appearance the cause will be heard *ex parte*.[1]

The general nature of the proceedings is sufficiently indicated for our purposes in the following statement by the court respecting original suits in equity:

"It has been determined that the court will frame its proceedings according to those which have been adopted in the English courts in analogous cases, and that the rules of the Court of Chancery should govern in conducting the case to a final issue; although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice."[2]

Our interstate controversy is now before the court, which has taken jurisdiction to this extent, that it is ready to decide whether the controversy is of "lawful original cognizance,"[3] and, if so, to give judgment for whichever party shall make good its contention.

### *Principles of Decision.*

25. When a court takes jurisdiction of a suit between citizens of different countries or States of the Union, and

[1] Rhode Island *v.* Massachusetts, 12 Peters, 761.

[2] California *v.* Southern Pacific R., 157 U. S. 259.

[3] Rhode Island *v.* Massachusetts, 12 Peters, 722. See also Missouri *v.* Illinois, 180 U. S. 240.

each party appeals to a different local law, there is a true "conflict of laws" in a juridical sense, and the court is called upon to decide which law really governs the case.[1] A controversy between independent nations is not a "conflict of laws." It is a clash of wills, and should diplomacy fail to compose a dispute not justifying resort to arms, yet sufficiently insistent to warrant an arbitration, the arbitral tribunal derives its judicial powers from the compact creating it.

Between these extremes of private suits and sovereign quarrels lie justiciable controversies between States of our Union. When we say "Russia is a state, Nicaragua is a state," we remark the theoretical equality of the greater and lesser members of the family of nations within the purview of an international law which, in any controversy, derives whatever authority it may actually enjoy from the assent of the members interested, and none whatever from the decree of a common authority. When we say "Kansas is a State, Colorado is a State," we mean the practical equality of all members of the Federal Union within the purview of a common constitutional law expounded by a supreme tribunal. I perceive but a single suggestion of inequality among our States, and that is in the pledge made to the State of Texas, that, upon its request, as many as four additional States carved out of its territory shall be admitted to the Union; and even this unique privilege does not denote an effective exception to the rule of equality, for neither Texas itself, nor the Supreme Court can enforce the pledge. The pledge is essentially political; it is redeemable only by Congress exercising its constitutional powers, and its constitutional discretion in the admission of new States.

26. The legal equality of the States among themselves, and before the Federal Constitution has an important bearing upon the law governing the justiciable controversies that may arise between them.

[1] "Which of the different local laws with which the legal relation in dispute in any way comes in contact," says Savigny, "is to be applied in the decision of the question? This is the meaning of the question of collision in respect to territorial laws." Conflict of Laws, Guthrie's Translation, 2d ed., p. 60.

The States in controversy cannot agree upon the governing principle, because, unlike independent nations engaging in arbitration, their case is submitted to a supreme tribunal whose powers are beyond their control.

More importantly, neither State can impose its own law as the ruling authority—and I mean by "law" its constitution, its statutes and its principles of jurisprudence—and this is so even supposing the very ground of complaint to be an alleged disparagement of this law as the result of a statute passed by the defendant State. Like independent nations, neither is amenable to the laws of the other. In such a case the court should decline to find the ruling principle in either local law, and find it in a general law governing interstate relations.

Because the rule affirming the freedom of a State from the obligation of another's laws is simply another way of stating that the laws of each State are framed exclusively for the governing of persons and things within its own jurisdiction, it seems to exclude all reliance upon such laws as determinative of interstate suits. As variant laws will not justify the Supreme Court in choosing between them, so the circumstance of similar laws will not oblige it to accept their common principle as decisive. So completely out of court are State laws in this relation that it would seem that a defendant State can gain nothing by showing that the complainant is inflicting upon another State the very injuries of which it complains in the case at bar.

Considering the peculiar nature of an interstate suit it seems inevitable that, excepting the cases of contract presently mentioned, the Supreme Court shall determine the principle of adjudication, unhampered by any limitation save such as may inhere in the nature of the States, or be imposed by the Federal Constitution. It may draw inspiration from common, civil, international and public law at discretion. But in every case the court will respect that law of its being which confers upon it "judicial power," as distinguished from the political power of the legislative and executive departments, by reaching a conclusion by judicial methods. And it will endeavor to respect the position of precedent in our jurisprudence by deciding a novel case upon principles that will thereafter guide the determination

of similar cases. This is especially important in interstate suits, for the equality of States requires that a principle declared in a suit between particular States shall measure the rights and duties of all the States with regard to like subjects of controversy.

27. A suit on contract is not necessarily within the principle of the above rule. If two States make a compact within the purview of the Constitution, and a suit is brought on account of an alleged breach, the court will of course construe the compact and render judgment in accordance with its terms.

Furthermore, should a State become party to a contract framed under the laws of another State a suit on it will be governed by the law of the place. This common rule was applied in United States *v.* North Carolina, where the court said:

> "The case * * * falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view."[1]

The rule would be equally applicable in an interstate suit. In neither case is there an improper submission of one sovereign to another's laws; there is a voluntary acceptance of that other's laws by becoming party to its contract. If a State can show that the contract was unconstitutional when made, well and good; but it cannot plead invalidation by subsequent legislation, because it is forbidden by the Constitution to impair the obligation of contracts.

### *Execution of Judgment.*

28. The issuance of execution on judgment is a normal feature of an ordinary suit at law, but where a judgment is sought against a State the question of Federal competency to execute it may go to the marrow of the case. For a State of our Union, while not an independent sovereign, has attributes of sovereignty which will embarrass, and perhaps bar the execution of a judgment that would attaint them.

[1] 136 U. S. 222.

The subject is not an academic one. The Supreme Court once ordered a State to release a prisoner condemned under a local statute, which it stigmatized as repugnant to the Constitution, laws and treaties of the United States.[1] It was this order that provoked President Jackson to exclaim:

"John Marshall has pronounced his judgment; let him enforce it if he can."[2]

In Worcester *v.* Georgia, the Supreme Court gave judgment and saw a co-ordinate department of the Federal government refuse to further its execution. But later, in Kentucky *v.* Dennison,[3] the court at once declared a duty owing to one State from another, yet declined to give judgment on the ground that it could not be lawfully enforced. In 1860 Kentucky sought to compel the Governor of Ohio to return a fugitive from justice in conformity to the provision of the Federal Constitution:

"A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

The Supreme Court found a controversy between States, inasmuch as the Governor of Ohio was sued in his representative capacity; it affirmed the duty of the governor to surrender the fugitive; but it refused to issue a *mandamus* to him on the ground that the Constitution did not confer power to enforce the duty.

In pleading for judgment for Chisholm against Georgia Edmund Randolph exclaimed:

"What if the State is resolved to oppose the execution? This would be an awful question indeed! He to whose lot it should fall to solve it, would be impelled to invoke the god of wisdom to illuminate his decision."[4]

Yet he asked for judgment with confidence in the State's submission. The judgment was rendered, but his confidence in Georgia must have been destroyed when the State

[1] Worcester *v.* Georgia, 6 Peters, 515.
[2] 1 Bryce's American Commonwealth, 1st ed., 362.
[3] 24 Howard, 66. [4] 2 Dallas, 427.

passed an act making an attempt to execute it an offence punishable with death.[1]

In Kentucky *v.* Dennison the Supreme Court shrewdly declined to place the United States in a dilemma from which a revelation of supernatural wisdom could alone extricate them. It held, substantially, that in a case where there is an absolute bar to the enforcement of a judgment against a State its jurisdiction is really incomplete.

29. It would be imprudent to draw a precise line between enforceable and non-enforceable interstate duties, but I venture a few broad suggestions. Generally speaking, the complainant in an interstate suit may be supposed to crave relief in one of the following ways:

Through the action of the complainant--This the Supreme Court may be competent to authorize; for example should a State prove its claim to land held by another a judgment will entitle it to take possession.

Through the cessation of acts within the jurisdiction of the defendant—This is the relief requested in Kansas *v.* Colorado, and will be considered later.

Through the performance of some act by the defendant —this the court may find itself unable to coerce, as in Kentucky *v.* Dennison.

What if the act in question be the payment of money? Will the Supreme Court decline to entertain any pecuniary suit against a State upon the assumption that a judgment would not be willingly paid and could not be enforced, applying to these suits John Marshall's definition of a "case" within the meaning of Article III, section 2 of the Constitution: "There must be parties to come into court, who can be reached by its process *and bound by its power*, whose rights admit of ultimate decision by a tribunal *to which they are bound to submit.*"[2] Or will the court entertain a suit stating a good cause of action without anticipating the outcome of a judgment.

Hamilton, who was not accustomed to magnify the position of the States, went so far as to say:

[1] See W. A. Scott's Repudiation of State Debts, p. 11.

[2] Speech in House of Representatives, 5 Wheaton, Appendix, p. 17. The italics are mine.

"To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State, and to ascribe to the Federal court by mere implication, and in destruction of a pre-existing right of the State government, a power which would involve such a consequence, would be altogether forced and unwarrantable."[1]

And Webster said:

"It has been said that the State cannot be sued on these [State] bonds. But neither could the United States be sued, nor, as I suppose, the Crown of England, in a like case. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligation of a government, arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is not probable that it could or would make provision for satisfying the judgment."[2]

But in United States *v.* North Carolina the Supreme Court accepted jurisdiction,[3] and there is nothing to show that it would not have given judgment for the plaintiffs had they made out their case. And I think that the court should not decline to render a pecuniary judgment against a State on the assumption that it will not be satisfied. For the State might prefer to pay, or compromise the claim rather than be prejudiced by an outstanding judgment. Or the legality of the claim might be the only matter in dispute, the State being ready to abide by the decision. If the State should refuse to pay, there is, of course, no Federal power either to compel its legislature to raise the money by taxation, or to seize the public funds; but the State may hold property as in private proprietorship which may be found liable to execution; if so, the line between this and property exempt by reason of its devotion to public uses will be drawn somewhere between such properties as a State railroad and a State capitol. Finally, if for any reason the judgment is not paid in fact, the court has at all events performed its judicial function, and the plaintiff is no worse off than a private suitor who gains a barren judgment.

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[1] Federalist, No. 81.

[2] Opinion given to Baring Brothers, Works, VI, 539.

[3] *Supra*, Sec. 5.

Perhaps a case like Kentucky *v.* Dennison may be thus distinguished from a pecuniary action. In the former, a judgment would necessarily attaint a State's sovereignty: Therefore it will not be rendered. In the latter, a judgment would not necessarily attaint a State's sovereignty: Therefore it may be rendered, leaving the question of its satisfaction to be determined later.

CARMAN F. RANDOLPH.

(*To be continued.*)